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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 87

WILLIAM D. FRAD,

Relator-Appellant,

against

JOHN J. KELLY, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, UNITED STATES OF AMERICA,

Appellee.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF WILLIAM D. FRAD, APPELLANT.

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Summary of Argument.

Respondent has not disputed that the order of December 16, 1935 is valid and enforcible, because (a) it is properly captioned and properly filed, and still remains a valid order of the Southern District Federal Court, since it is unva-

cated and has *not* been appealed; (b) the question of the proper venue of the hearing on the application, leading to the order of December 16, 1935, if questionable, was waived when the Probation Officer appeared on the return day in the Eastern District, and argued the matter on its merits, without challenging Judge Inch's jurisdiction to hear the motion while sitting in the Eastern District; (c) any defect in venue was waived by the District Attorney (1) by moving in the Southern District to resettle the order, (2) by arguing that motion on its merits, and then, (3) by agreeing to let the order stand as it is.

The law is settled that a public officer may waive a defect in venue, and may even do so by appearing in a proceeding in a district other than the one in which he is appointed to serve. While the law specifies the duties of a Probation Officer and District Attorney, it does not limit the place, time, or manner in which those duties are to be performed.

Furthermore, no case has been cited by Respondent which holds that a Trial Judge is deprived of concurrent jurisdiction with Judges subsequently sitting in the Trial Court, to terminate a proceeding, where a defendant had originally been placed on probation by the Trial Judge after imposition of sentence had been suspended. For such an order, terminating the proceedings and discharging the probationer from further supervision, is a final disposition of a "matter" that had been submitted to the visiting Trial Judge within the meaning of Section 18 of the Judicial Code, and which "matter" had been left open. That "matter" was the sentencing of the defendant on his plea of guilty.

As the Probation Act expressly and concededly permits a judge to enter an order fully discharging a probationer and finally terminating the proceedings, and as the order of December 16, 1935 is literally phrased in the language of

the Act, all proceedings against the Petitioner were terminated and he was fully discharged.

Whatever disposition this Court will make of the *Greenhaus* case principle, the writ of Habeas Corpus must be sustained. If the *Greenhaus* case principle is sustained, then the original probation order on the second and third indictments was void, so the Petitioner cannot now be accused of violating an *invalid* probation order; furthermore he has already fully served the valid portion of the sentence imposed upon him. If the *Greenhaus* case principle is not sustained, then, of course, the original probation order here was valid, and Petitioner could properly be discharged from the effects thereof, as was intended by the order of December 16, 1935.

POINT I.

The Order of December 16, 1935, is Valid and Binding.

A.

The Respondent does not dispute, or even attempt to distinguish, the cases cited by Petitioner, which hold that an order must be deemed valid, an denforced, regardless of any other reasons, if it is properly captioned and filed in the court where the action is pending, and if that order remains unvacated.

In the case at bar, the order of December 16, 1935 was captioned Southern District of New York, was duly entered in the Clerk's Office of that Court, and still remains on file there, unvacated and unappealed from, and, therefore, it must be recognized and enforced as a valid order. (See Point VI of Petitioner's Main Brief.)

B.

The Respondent has not attempted to answer the Petitioner's argument that the Probation Officer of the Southern

District should have objected to the venue, if there was any venue question, at the time Judge Inch heard the application for discharge and termination of the proceeding in chambers in the Eastern District, and, by failing to so object, and in arguing the matter on its merits, acquiesced in the right of Judge Inch to hear the application there, even though he was sitting in the Eastern District. (This question is fully discussed in Point IV of Petitioner's Main Brief.)

The only answer by the Respondent is indirect. In its brief, Point II (3), Respondent cites *R. S. 771, 28 U. S. C. Section 485* in support of its contention that neither the District Attorney, nor the Probation Officer, had any power to represent the United States in a matter outside of the district for which they were appointed.

There are two cases which expressly contradict the Respondent's contention, and which hold that public officers may validly represent the Federal Government in districts other than those for which they are appointed, for *that section merely specifies what their duties are to be, and not when, where or how they are to perform those duties.*

Atkins v. *Bender* (D. C. La. 1927), 18 F. (2d) 357 (discussed in Point IV of Petitioner's Main Brief, p. 42) directly holds that *R. S. 771, 28 U. S. C. Sec. 485* does *not* limit the power of the District Attorney, or direct how his duty shall be performed, and does *not* prevent him from waiving objections to citation, or to jurisdiction of a particular District Court to hear the matter, which is an objection only of venue, and not to jurisdictional power.

And in *U. S.* v. *Goldstein*, 271 Fed. 838, the original action was tried in the Eastern District of Missouri. Judge Pollock of Kansas had been temporarily assigned to sit in the Eastern District. He heard the particular matter in controversy, entered his final decree in the Missouri Court, and returned to Kansas. Three years later, an application to

modify that decree was made to Judge Pollock in Kansas. The opinion there states what then happened (p. 841):

> "Notice of the application to be made to Judge Pollock on September 21, 1918, at Kansas City, Kan. was duly served on the District Attorney for the *Eastern District of Missouri* and the Chief Naturalization Examiner of the United States. On that day the parties appeared before Judge Pollock at *Kansas City, Kan.* and on motion of the solicitors for Appellant the hearing was continued until September 26, 1918, *at Wichita, Kan.*, in order to give them an opportunity for investigation of the facts. *No objections were made by appellant at that time.* At the hearing at Wichita, the United States for the first time objected to the jurisdiction of Judge Pollock to hear the motion in Kansas. * * *" (Emphasis ours.)

The Circuit Court of Appeals held that the revised decree of Judge Pollock, which eliminated important provisions, was *valid*, stating, as to the fact of waiver by the District Attorney:

> "It is also proper to state in this connection that, when the motion was first presented to Judge Pollock, at Kansas City, Kan., no objection to his hearing it in the State of Kansas was made by the solicitors for the appellant."

C.

In connection with Respondent's argument that the District Attorney had no power to appear in a district other than the one for which he was appointed, it is important to note that this argument is, at most, academic here. The District Attorney's acquiescence in the validity of Judge Inch's order of December 16, 1935, is indicated by his affirmative *acts which took place only in the Southern District of New York.*

The District Attorney for the Southern District of New York moved for *re-settlement and not to set aside*, the order

of December 16, 1935, which motion was made returnable in the Southern District. That motion was argued there *on the merits*, and the order was there accepted by him as valid, in so far as Judge Inch's jurisdiction to make it was concerned. He only argued for a change of language of the order. The court granted that application and he agreed that even this change would not be made "until such time as we find it necessary" (R. 65). In other words, there was a complete acceptance by him that the order of December 16, 1935, *as it now stands*, was a valid exercise of judicial power by Judge Inch, but he merely questioned the contents, which point he later abandoned—at least temporarily for this motion.

Therefore, his acts, all of which took place in the Southern District, are sufficient to constitute a waiver of any defect in venue, and also constitute an acquiescence in the jurisdiction of Judge Inch to make the order of December 16, 1935.

D.

The foregoing considerations, in themselves, show that the order of December 16, 1935, must be deemed valid and enforced, even if Judge Inch sitting in the Eastern District in chambers had no jurisdiction to hear the motion.

Yet none of Respondent's cases hold that the trial or sentencing judge does not have *concurrent jurisdiction*, after the trial, with a subsequently sitting judge of the trial court, in relation to probation, where imposition of sentence was suspended.

The only case urged by Respondent to support its contention that a judge of the trial court has exclusive jurisdiction over the probationer is *Grant* v. *Guernsey* (63 F. (2) 163 C. C. A. 10), cited in Point II (3) of Respondent's brief. That case, however, has nothing to do with the point. In that case, a *Federal* Court placed the defendant on proba-

tion. Thereafter he was arrested by a *State officer* for a state crime, which he had committed prior to the crime for which he had been tried in the Federal Court. The defendant sued out a writ of Habeas Corpus, and the court naturally held that, since the defendant was under the jurisdiction of the *Federal Courts,* the warrant for the arrest of the defendant issued by a State court was a direct interference with Federal jurisdiction, and violated comity between Federal and State courts. It did *not* involve or even consider the point here presented that a sentencing judge of the Federal Trial Court shares concurrent jurisdiction with a subsequently sitting Federal judge of the same court over a probationer whom the original sentencing judge had placed on probation.

As a matter of fact, in Point II (2), Respondent admits that

> "probation may be granted (*Ackerson* v. *United States,* 15 F. (2d) 268 (C. C. A. 2d) or revoked (*United States* v. *Greenhaus,* 14 F. Supp. 268 (S. D. N. Y.) *by any judge of the trial court and not solely by the judge who imposed the sentence.*" (Emphasis ours.)

With this statement, Petitioner agrees, and also respectfully submits that the concurrent jurisdiction of the trial judge continues, even when the trial judge returns to his home district. (See discussion of this in Point III of Petitioner's Main Brief.)

So that Judge Inch had jurisdiction to make the order.

From any point of view, the order is valid and enforceable.

Point II.

The Judicial Code, Section 18, as Amended, Granting to a Visiting Judge, Who Returns to His Own District, the Power "To Decide All Matters Which Have Been Submitted to Him Within Such District", is Applicable to the Order of December 16, 1935.

The Respondent argues in Point II (2) of its Brief, that Judge Inch's order of December 16th, 1935, discharging the Petitioner from further probationary supervision and terminating the proceedings was not related to any "matter", which had been submitted to Judge Inch when he was sitting in the Southern District of New York, but was a "new matter", and hence did not come within *Judicial Code, Section 18.*

The tenuousness of such an argument is apparent on its face. The matter submitted to Judge Inch, when he was sitting in the Southern District, on the Petitioner's plea of guilty, was the sentencing of the Petitioner. Judge Inch did not finally dispose of this matter at that time, but held it in abeyance, by suspending the imposition of sentence on two of the indictments, meantime placing him on probation. This same *matter*, that is, relating to the sentencing of the Petitioner, was again brought before Judge Inch when he was sitting in the Eastern District. This time, the Petitioner asked that a final disposition be made of the matter which had been submitted to Judge Inch in the Southern District, and that the threat of a future sentence be removed, by an order discharging him from probationary supervision and terminating the proceedings.

Now it may be true that in support of this application, the Petitioner presented certain "*new facts*" concerning his health, which had not been before Judge Inch at the time he was sitting in the Southern District. But this is far

different from the argument made by the Respondent in its brief, that the order terminating the proceedings against the Petitioner was a disposition of a "new matter" which had no relation to any matter submitted to Judge Inch when he was acting as a judge in the Southern District of New York.

He merely made final disposition of the "matter" which had originally been submitted to him in the Southern District, by discharging the Petitioner from further probationary supervision and terminating the proceedings against him. (See Appellant's Main Brief, Point II, p. 25ff.)

The suspension of the imposition of sentence; the placing of the Petitioner on probation; the discharge of the Petitioner from further probationary supervision, and the termination of proceedings, *were all inseparably connected to each other as flowing from the same matter—the matter of sentencing the Petitioner.* In connection with the close relationship between the suspension of the imposition of sentence and probation, it should be observed that suspension of the imposition of sentence is not authorized, unless the defendant is at the same time placed on probation (*Sec. 724 Probation Act; Ex Parte De Angelo 50 F. (2) 847, 848 (C. C. A. 6th).*

The link between placing a defendant on probation and discharging him from probation is self evident. In both instances, the judge's decision is based on the conduct of the defendant, past and present, and if certain "new facts" are brought to the attention of the judge, they do not change the nature of the "matter", which still remains the same, namely, whether the probationer's conduct merits clemency instead of punishment.

Cases holding that the *trial judge* is generally the preferable judge, and has jurisdiction to grant such relief even though a sitting judge of the trial court might also do so,

have already been discussed. (Point III of Appellant's Main Brief.)

Respondent further urges that the validity of orders made by a temporarily designated judge, after his departure from the district wherein he heard and tried these cases is a "purely incidental and supplementary" form of "permissible judicial acts". (Point II [1]). That is just what is claimed by Petitioner in the instant case. Judge Inch's order of December 16, 1935, was "*purely incidental and supplementary*" to his original order suspending the imposition of sentence, and placing the Petitioner on probation.

The case of *U. S.* v. *Goldstein*, 271 Fed. 838 is analogous to the instant case, and is one of those mentioned by Respondent as involving orders "purely incidental and supplementary" to other orders entered by the temporarily assigned judge.

In the *Goldstein* case, three years after a judge returned to his home district, he heard an application in his home district to modify a decree made by him while he was sitting as an assigned judge in another district. He made an order, while in his home district, modifying the first decree, and that decree was then entered in the court in which the action had originally been instituted. That order was held valid. The situation at bar, in effect, is precisely the same. Judge Inch's order of December 16, 1935, supplements the first order made by him while in the Southern District, by *finally disposing of a matter which the first order had left open.*

In that sense, it is respectfully submitted, that it may fairly be said that the order of December 16, 1935 was "purely incidental and supplementary" to the original order suspending sentence and placing the petitioner on probation, and, therefore, one of the "permissible judicial

acts" of a temporarily assigned judge, who enters an order after he has returned to his own district affecting a proceeding in the district to which he had been temporarily assigned.

The order of December 16, 1935, even though made in the Eastern District, was, therefore, a proper disposition of "a matter" which had been submitted to Judge Inch while he was acting as a judge for the Southern District of New York.

POINT III.

The Effect of the Order of December 16, 1935, was to Completely Terminate the Proceedings Against the Petitioner and to Terminate the Court's Jurisdiction Over Him in Relation to All Matters Pertaining Thereto.

The Respondent, in Point III of its brief, concedes that *Section 725* of the Probation Act

> "may be given the broader construction which would permit the trial court to terminate the entire proceedings so completely that no further action could be taken against the defendant. *United States* v. *Antinori*, 59 F. (2d) 171 (C. C. A. 5th), *United States* v. *Maisel*, 26 F. (2d) 275, (S. D. Texas)."

But the Respondent argues that the order of December 16, 1935, does not refer to "all" proceedings, or the "entire" proceedings, but only terminates "the proceedings".

The order as it is now entered in the Clerk's Office of the Southern District reads as follows:

> "• • • the defendant is discharged from further supervision and the proceedings against him in this cause be, and the same are hereby terminated."

This means not only that the Petitioner was discharged from probationary supervision *but that in addition*, "the proceedings against him in this cause" were terminated.

That certainly means "all" or "entire", because it does not limit the termination to a mere portion of "the proceedings."

The language of that order is the verbatim language of *Section 725* of the Probation Act, which expressly empowers a judge to make the disposition which was made by Judge Inch by virtue of the order of December 16, 1935. The Act says:

> "The Court may thereupon discharge the probationer from further supervision and may terminate *the proceedings* against him." (Emphasis ours.)

The order does no more than literally incorporate the language of the act. Whatever effect that order has must be determined by the effect of the wording of the act. And the Respondent has admitted that the *Antinori* and *Maisel* cases, cited *supra*, have already held that the above language of the act may be construed to mean that a judge may make an order completely dismissing the court's jurisdiction over a defendant. That is precisely the situation here, and that is the effect which must be given to the order of December 16, 1935.

Point IV.

Regardless of the Validity of the Order Suspending Sentence on the Second and Third Indictments, and Granting Probation to Begin After the Sentence Imposed on the First Indictment, the Petitioner Herein Cannot Now be Re-Sentenced, Because He Has Already Served the Valid Portion of the Sentence Imposed on Him, and Which Related to the First Indictment.

In the case of *United States* v. *Greenhaus*, 85 F. (2) 723, discussed by Respondent in Point I of its brief, a situation existed which does not exist in the case at bar. In the *Green-*

haus case, *sentence was actually imposed* on all the counts in that indictment, but execution of those sentences was suspended. In the instant case, sentence was at no time imposed on the second and third indictments.

If the suspension of the imposition of the sentences on the second and third indictments, and the placing of Petitioner on probation in the case at bar, was invalid, because this was coupled with a sentence of imprisonment, the bad part falls, and only the valid part stands, and that part has already been served. This Court has already decided that where a part of the sentence imposed on a defendant was illegal, and the remainder valid, the legal part becomes the whole sentence, and the invalid portion must be disregarded. *Ex Parte Lange*, 18 Wall. 163, 167.

And in *Hammers* v. *U. S.* (C. C. A. 5th) 279 Fed. 265, 266-7, the court said that a court may lose "jurisdiction to resentence as a result of a previous imposition of *a valid punishment, to which,* in whole or *in part,* the convict was subjected", for in that situation the man would be "punished twice for the same offense." (Emphasis ours.)

Applying that reasoning to the case at bar, it becomes apparent that, even if it were held that placing the Petitioner upon probation was invalid when joined with a sentence of imprisonment, which is the rule of the *Greenhaus* case, the latter sentence was valid, and since it was served in full by the Petitioner, the alleged invalid probationary portion must be disregarded, as mere surplusage, and the thousand dollar fine, which was paid, and the two year sentence which was imposed and served, must be deemed to be the complete sentence of the case.

Moreover, if the probationary portion of that sentence was invalid, then Petitioner cannot now be charged with a probation violation. And that is the only charge which has been brought against the Petitioner in this case.

In summary then, if the reasoning in the *Greenhaus* case does *not* apply to our case, then the probationary provision herein was valid, and the defendant was, thereafter, properly discharged and the proceedings against him terminated by virtue of the order of December 16, 1935.

If on the other hand, the reasoning in the *Greenhaus* case does apply to the facts in the case at bar, then the probationary portion of the sentence was invalid, and the sentence of imprisonment, and fine, which was valid, becomes *the complete sentence of the case, and since* the Petitioner did serve that sentence, he cannot now be brought into court to face charges of violating an *invalid* probationary order.

Respectfully submitted,

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